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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

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AZ CORP COMMISSION
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IN THE MATTER OF THE PETITION)	Docket No. T-03632A-04-0425
OF DIECA COMMUNICATIONS, INC.,)	Docket No. T-01051B-04-0425
D/B/A COVAD COMMUNICATIONS)	
COMPANY, FOR ARBITRATION TO)	
RESOLVE ISSUES RELATING TO AN)	
INTER-CONNECTION AGREEMENT)	
WITH QWEST CORPORATION)	

**COVAD'S MOTION FOR LEAVE TO FILE A RESPONSE TO QWEST'S
EXCEPTIONS AND COVAD'S RESPONSE TO THE EXCEPTIONS**

Motion

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") moves for leave to file this response to Qwest Corporation's exceptions to the Recommended Order and Opinion in this docket. Covad submits that the below response is important for clarifying the record with respect to several, simple yet critical matters. The response is also necessary due to Qwest's procedurally improper request for discovery nearly a year after the discovery deadline in this docket. Therefore, Covad requests leave to file the brief response set forth below.

Response to Qwest's Exceptions

I. FCC WIRELINE BROADBAND ORDER

As Covad pointed out in its December 2, 2005 reply brief¹ concerning the Federal Communication Commission's (FCC) *Wireline Broadband Order*,² the FCC states clearly that:

. . . [s]everal competitive LECs, and one BOC, argue that regardless of how the Commission classifies wireline broadband Internet access service, including its transmission component, competitive LECs should still be able to purchase UNEs, including UNE loops to provide stand-alone DSL telecommunications service, pursuant to section 251(c)(3) of the Act. We agree. . . . **Accordingly, nothing in this Order changes a requesting telecommunications carriers' UNE rights under section 251 and our implementing rules.**³

Despite this unambiguous and explicit statement by the FCC that the *Wireline Broadband Order* has no relevance to this proceeding, Qwest contends—without explanation or legal citation—that, because Judge Nodes' Recommended Opinion and Order was “conclusory,” it is somehow flawed. This contention is nonsensical in the face of the plain language of the FCC's order, and therefore the Commission should reject it just as quickly and succinctly as the Arbitrator did.

Qwest also contends (again) that Covad has failed to demonstrate that it provides a telecommunications service in Arizona and should therefore be required to provide this information in response to certain data requests attached to Qwest's exceptions. But this Commission has already determined that Covad is authorized to provide a

¹ Attached as Exhibit 1 to this response and incorporated herein by reference.

² *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, FCC 05-150, Report and Order and Notice of Proposed Rulemaking (9/25/2005).

³ *Wireline Broadband Order*, ¶¶126-127 (emphasis added).

telecommunications service in Arizona,⁴ and Covad has already identified a telecommunications service that it provides in Arizona (T1s).⁵ Given the Commission's determinations on this issue and the fact that Covad obtains some of the telecommunications services it provides to Arizona residents directly from Qwest (again, T1s), Qwest's continuing protestations of ignorance about the nature of Covad's service offerings are puzzling to say the least. Covad is—plainly and simply—a telecommunications provider in Arizona and the Commission should not allow its time to be wasted further on this issue.⁶

II. SECTION 271

Qwest devotes almost the entire 22 pages of its exceptions to the subject of section 271 unbundling and pricing. Even less needs to be said here in response than above. Judge Nodes correctly concluded that this Commission has authority to require Qwest to provision section 271 network elements in the context of a section 252 arbitration and, moreover, that TELRIC is the correct pricing standard for these elements. Again, Qwest simply rehashes old arguments and otherwise fails to articulate a single valid reason to amend the Recommended Opinion and Order.

⁴ See Arizona Corporation Commission Decision No. 61942 (September 17, 1999)(granting CC&N to Covad).

⁵ In ¶9 of the *Wireline Broadband Order* the FCC expressly found that T1 and other “high-capacity special access services” are telecommunications services (see Covad reply brief, p. 4 and footnote 2).

⁶ Moreover, Qwest's request for discovery in connection with its exceptions is improper. The discovery deadline in this docket was January 21, 2005 -- almost a year ago. (See June 8, 2004 Procedural Order). The ostensible basis for the discovery -- the *Wireline Broadband Order* -- was issued over three months before Qwest's exceptions were filed.

Similar to the findings of the Tennessee Regulatory Authority in an October arbitration order,⁷ Judge Nodes concluded his discussion of the 271 issue in this way:

Indeed, Section 271(c)(2) is titled, "SPECIFIC INTERCONNECTION REQUIREMENTS" and under subsection (A) of that provision, the requesting BOC is considered to have met the requirements of the section if it is providing access or interconnection pursuant to its SGAT or an interconnection agreement, both of which require state commission approval under Section 252. Since Section 271 does not contain any separate provisions for approval of interconnection agreements or SGAT provisions, **it must be presumed that the review process of such Section 271 provisions would occur within the Section 252 review process.**

(p. 20) (emphasis added).

Rather than directly addressing the compelling logic of Recommended Opinion and Order, Qwest argues that the weight of other state commissions in the Qwest region that have considered this issue should carry the day. Judge Nodes carefully noted his disagreement with several of these decisions—which are, of course, merely persuasive authority—and the Commission should reject Qwest's invitation to allow Arizona to be ruled by the tyranny of the majority. Judge Nodes got it right.

For the foregoing reasons and the reasons set forth in Covad's filings below, Covad requests that the Commission affirm and adopt the Recommended Opinion and Order.

⁷ *Petition for Arbitration of ITC Deltacom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket 03-00119 (October 20, 2005) (then Director Tate joining in a unanimous decision). A copy of this decision was filed with Covad's second notice of supplemental authority.

RESPECTFULLY SUBMITTED this 9th day of January, 2006.

DIECA COMMUNICATIONS, INC.

By 

Michael W. Patten
ROSHKA DEWULF & PATTEN, PLC
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004
(602) 256-6100

and

Gregory Diamond
Senior Counsel
Covad Communications Company
7901 Lowry Boulevard
Denver, CO 80230
(720) 670-1069

Original and 15 copies of the foregoing
filed this 9th day of January, 2006 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered/mailed
this 9th day of January, 2006 to:

Dwight Nodes
Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Maureen A. Scott
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Ernest G. Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Timothy Berg
Theresa Dwyer
Fennemore Craig
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012

Winslow B. Waxler, Esq
Qwest Services Corporation
1005 17th Street, Suite 200
Denver, Colorado 80209

Norman G. Curtright
Corporate Counsel
Qwest Corporation
1801 California, Suite 4900
Denver, Colorado 80202

John Devaney
Perkins Coie, LLP
607 Fourteenth Street, N.W.
Suite 800
Washington, D.C. 20005

By: Mary Ippolito

EXHIBIT

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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
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MARC SPITZER
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INTER-CONNECTION AGREEMENT)	
WITH QWEST CORPORATION)	

**COVAD'S REPLY TO QWEST'S COMMENTS REGARDING THE FCC'S
BROADBAND ORDER**

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") submits this reply to Qwest's comments regarding the Federal Communications Commission's ("FCC") recent *Broadband Order*:

As discussed below, the FCC has already resolved the very question raised by Qwest and found that the *Broadband Order* has no affect on Covad's rights under 47 U.S.C. § 251 and, by extension, 47 U.S.C. § 252. Ignoring the FCC's express language, however, Qwest inappropriately and incorrectly argues that Covad might not be entitled to enter into an interconnection agreement with Qwest because Covad may only be an information service provider in Arizona, not a telecommunications carrier. Qwest argues that the *Broadband Order* stands for the proposition that if a carrier provides digital subscriber line (DSL) service that includes internet access as a component of the service,

the service is an information service. Hence, Qwest argues, if Covad provides only information services in Arizona, then Covad would not be a telecommunications carrier (a provider of “telecommunications service”) and therefore would not be entitled under 47 U.S.C. § 252 to require Qwest to negotiate an interconnection agreement in good faith with Covad. Qwest further claims not to know whether Covad provides a telecommunications service in Arizona, and it demands that Covad come forward and demonstrate that it in fact does so.

The Commission should reject Qwest’s argument for three distinct and independently sufficient reasons. First, Qwest’s argument is procedurally improper and should be ignored. Second, Qwest’s argument is simply wrong, and it completely ignores the FCC’s express finding that the *Broadband Order* does not affect UNE and interconnection issues. Third, and finally, it is self-evident that Covad is a telecommunications carrier entitled as a matter of law to enter into interconnection agreements with Qwest.

Qwest’s argument is procedurally improper and should be ignored. Its comments violate the arbitrator’s last order, which said that “Staff, Covad and Qwest shall file comments regarding the impact of the FCC’s order in CC Docket No. 02-33 on the issues raised in this proceeding. . . .” (emphasis added). Five issues were arbitrated in this docket, none relating in any way to Covad’s right to negotiate, arbitrate and ultimately enter into an interconnection agreement with Qwest. The issues raised and arbitrated only relate to the terms and conditions of the interconnection agreement itself, not the threshold issue of Covad’s right to compel Qwest to negotiate an interconnection agreement. Qwest’s argument regarding this threshold issue, therefore, is an entirely

new and substantive issue that has never been raised before and was certainly never arbitrated. The parties conducted extensive pre-arbitration negotiations on select issues and engaged in a lengthy arbitration, including an evidentiary hearing. The parties also filed comprehensive post-hearing briefs. Qwest cannot restart the process at this late date to arbitrate an issue never raised before. The arbitrator did not grant Qwest the right to do so.

Qwest's argument, moreover, is simply wrong. The FCC expressly concluded that the *Broadband Order* has no impact at all on a CLEC's rights under section 251 of the Act (including Covad's right as a CLEC to an interconnection with Qwest).¹ Footnote 21 to Paragraph 9 of the *Broadband Order*, for example, says "Similarly, this Order does not disturb incumbent LECs' unbundled network element (UNE) obligations or competitive carriers' rights to obtain UNEs." Again, in Paragraph 127, the order says "[N]othing in this Order changes a requesting telecommunications carriers' UNE rights under section 251 and our implementing rules." Qwest completely ignored these definitive statements by the FCC in the comments it filed here.

The Telecommunications Act of 1996 expressly contemplates that the means to obtain UNEs and interconnection is through an interconnection agreement with an ILEC such as Qwest. See, 47 USC §251(c) and §252. Because the *Broadband Order* specifically preserved Covad's right to obtain UNEs and interconnection from Qwest, it necessarily follows that Covad's right to enter into an interconnection agreement with Qwest has also been preserved.

¹ The FCC reaffirmed that the *Broadband Order* has no impact on a competing carrier's right to obtain interconnection from an ILEC. See, *Broadband Order*, n. 400.

Finally, the Commission should reject Qwest's argument out of hand because the Commission has already determined that Covad is authorized to provide telecommunications services in Arizona. *In the Matter of the Application of the Petition and Application of DIECA Communications, Inc. dba Covad Communications Company for a Certificate of Convenience and Necessity*, Arizona Corporation Commission, No. T-03632A-98-0542, Opinion and Order (9/17/99). Because Covad may offer telecommunications services in Arizona it is, by definition, a telecommunications carrier. *See* 47 U.S.C. §153(44); 47 C.F.R. § 51.5. It is difficult, in fact, to understand how Qwest could claim not to know that Covad is a telecommunications carrier since Covad purchases UNEs and interconnection services from Qwest for a variety of products completely unaffected by the *Broadband Order*, including, for example, T1 services.² Since even Qwest acknowledges that telecommunications carriers are entitled to enter into interconnection agreements under 47 U.S.C. § 252, there can be no dispute that Covad is legally entitled to enter into an interconnection agreement with Qwest.

² The *Broadband Order* expressly finds that T1 and other "high-capacity special access services" are telecommunications services:

These characteristics distinguish wireline broadband Internet access service from other wireline broadband services, such as stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services, that carriers and end users have traditionally used for basic transmission purposes. That is, these services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities. Because carriers and end users typically use these services for basic transmission purposes, these services are telecommunications services under the statutory definitions. *Broadband Order*, ¶ 9, footnotes omitted.

In light of these comments as well as Covad's other submissions to date, should the arbitrator decide to discuss the *Broadband Order* as part of this docket, he should find that the *Broadband Order* has no impact on any of the issues in this docket.

RESPECTFULLY SUBMITTED this 2nd day of December, 2005.

DIECA COMMUNICATIONS, INC.

By 

Michael W. Patten
ROSHKA DEWULF & PATTEN, PLC
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004
(602) 256-6100

and

Gregory Diamond
Senior Counsel
Covad Communications Company
7901 Lowry Boulevard
Denver, CO 80230
(720) 670-1069

Original and ¹⁵~~13~~ copies of the foregoing
filed this 2nd day of December, 2005 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copies of the foregoing hand-delivered/mailed
this 2nd day of December, 2005 to:

Dwight Nodes
Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Maureen A. Scott
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Ernest G. Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Timothy Berg
Theresa Dwyer
Fennemore Craig
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012

Winslow B. Waxler, Esq
Qwest Services Corporation
1005 17th Street, Suite 200
Denver, Colorado 80209

Norman G. Curtright
Corporate Counsel
Qwest Corporation
1801 California, Suite 4900
Denver, Colorado 80202

John Devaney
Perkins Coie, LLP
607 Fourteenth Street, N.W.
Suite 800
Washington, D.C. 20005

By: _____

Mary Appolits